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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 335

HENRY J. ESCHMANN and LOUISE M. BURDINE,
wife of HENRY J. ESCHMANN,
Plaintiffs-Appellants,

versus

R. KIRK MOYER, ET AL,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 335

HENRY J. ESCHMANN and LOUISE M. BURDINE,
wife of HENRY J. ESCHMANN

versus

R. KIRK MOYER, ET AL

Petition for Writ of Certiorari to the
Louisiana Supreme Court

TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES COURT:

Petitioner, Louise Burdine Eschmann, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana finally entered on March 31, 1969 whereby Petitioner's application for rehearing for the Louisiana Supreme Court was denied.

Petitioner filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, which matter was tried before a jury and resulted in a jury verdict in favor of Petitioner in the full amount of $45,000.00 against R. Kirk Moyer and his liability insurer, the American Indemnity Company. Thereafter, a motion

for remittitur and, in the alternative, for a new trial, was denied by the trial judge and an appeal was taken to the Court of Appeals, Fourth Circuit, State of Louisiana. By opinion rendered on March 4, 1968, the Court of Appeals affirmed the verdict of the jury. Defendants then applied for a writ of certiorari to the Louisiana Supreme Court which was granted. By opinion dated February 24, 1969, the Supreme Court, State of Louisiana, overturned the findings of the jury as well as the Court of Appeals and rendered judgment in favor of Defendants. Petitioner avers that the reversal by the Louisiana Supreme Court of the findings of fact by the jury as well as the findings of the Court of Appeals is contrary to Petitioner's Constitutional rights under the second clause of the Seventh Amendment and the "due process clause" of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Circuit, is reported as *Eschmann v. Moyer,* 208 So. 2nd 405 (March 4, 1968). The opinion of the Louisiana Supreme Court, reversing the findings of the jury and the Court of Appeal, is reported as *Eschmann v. Moyer* 220 So. 2nd 86 (February 24, 1969). The application to the Louisiana Supreme Court for a rehearing which was denied on March 31, 1969 is reproduced in Appendix D. The sole question considered by the Court of Appeal and the Louisiana Supreme Court was one of fact, namely the negligence of defendant, R. Kirk Moyer, and the contributory negligence of petitioner. The Court of Appeals stated in its opinion:

> "The record contains ample evidence to support the jury's finding, implicit in it's verdict, that plaintiff's fall was due to the defective condition of the carpet in the vestibule and that Mr. Moyer was thoroughly cognizant of its condition and was personally negligent in not correcting it. We find no manifest error in such finding."

The Louisiana Supreme Court concluded after considering the record and without citing a single legal authority that the jury and the Court of Appeal erred and held that Mrs. Eschmann's place of employment was in accordance with the accepted and approved practices of such or similar places of employment; and that there was no personal negligence on the part of Mr. Moyer. No question of law was considered.

JURISDICTION

This case was tried to a jury which returned a verdict in favor of Petitioner and against Defendants on the question of a claim for personal injuries resulting from a fall in the office of an insurance agency as a direct result of the negligence of defendant, R. Kirk Moyer. In due course, a judgment in favor of Petitioner for $45,000 was awarded by the trial court pursuant to the jury verdict, which verdict was affirmed by the Court of Appeal, Fourth Circuit, State of Louisiana. Following application for writs, Louisiana Supreme Court reversed the findings of fact of the jury as well as the Court of Appeal and supplanted its own view of the purport of the testimony and evidence for that of the jury. On March 31, 1969, Petitioner's application

for a rehearing, filed with the Louisiana Supreme Court, was denied. Petitioner invokes the provisions of 28 USC, Section 1257 (3), as jurisdictional grounds for this application.

QUESTIONS PRESENTED

1. Is the last clause of the Seventh Amendment proscribing re-examination of facts found by a jury obligatory on a state court, where the Legislature of that state has granted to its citizens by statute plenary right to trial by jury of all issues of fact involved in claims in the nature of suits at common law?

2. Is the proscription against re-examination of jury findings by any court such a fundamental part of due process as to fall under the protective aegis of the due process clause of the Fourteenth Amendment and thus obligatory on state courts, where citizens of such a state have been granted the statutory right of trial by jury of all issues of fact involved in claims in the nature of suits at common law?

STATE LAWS INVOLVED

State laws involved in this matter include the provisions of Article 7, Section 11 of the Louisiana Constitution which provides for certiorari and other writs to courts of appeal, the provisions of Article 7, Section 41 of the Louisiana Constitution which provides for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases, and the provisions of the Louisiana Code of Civil Procedure;

Articles 1731-1814, which provide for a trial by jury in civil cases in Louisiana.

CONCISE STATEMENT OF THE CASE

Louise Burdine Eschmann was employed by the R. Kirk Moyer Agency, Inc. as a dictaphone-typist. The agency occupied the second floor of the premises located at 1552 Washington Avenue, a home converted into office space. At approximately noon on October 19, 1964, Mrs. Eschmann left her desk located in the front office intending to join several employees in the kitchen located near the rear of the building to eat lunch. Due to the peculiar arrangement of the office, it was necessary for Mrs. Eschmann to traverse a small landing approximately four by four feet in size and located immediately at the head of the stairs leading to the main office of the R. Kirk Moyer Agency, Inc. Mrs. Eschmann, while attempting to return to her desk to remove a confidential letter relating to the sale of the agency, tripped and fell over the loose and frayed edge of the carpet and was precipitated head-first down the stairs, thereby sustaining serious injury.

Suit was filed by Henry J. Eschmann and Louise M. Burdine Eschmann to recover damages occasioned by her fall. Henry J. Eschmann died during the pendency of these proceedings and Mrs. Eschmann was subsequently substituted sole party plaintiff. The matter was tried by a jury who returned a verdict on April 11, 1967, in favor of plaintiff, Mrs. Eschmann, and against R. Kirk Moyer and his insurer, the American Indemnity Company, in the amount of $45,000. The

other defendants were dismissed. By stipulations, judgment was also entered in favor of Intervenor, General Fire and Casualty Company, against the plaintiff, Mrs. Eschmann, in the amount of $16,166.48. An appeal was taken by defendants, R. Kirk Moyer and his insurer. The Court of Appeal, Fourth Circuit affirmed the judgment of the trial court. An application for rehearing was denied by the Court of Appeal following which defendants applied for and were granted writs of certiorari by the Louisiana Supreme Court.

The Louisiana Supreme Court agreed with defendants that the jury and the Court of Appeal had erred, and solely on the basis of fact, reversed. In support of this reversal, the judges of the Louisiana Supreme Court accepted certain portions of the testimony of certain witnesses which it considered supported defendant's theory of the case and wholly ignored that evidence, obviously relied upon by the jury, which supported plaintiff's theory of the case. In short, the Louisiana Supreme Court resolved the conflict of evidence in favor of the defendants and supplanted its verdict for that of the jury without ever having had the opportunity, as did the jury, to see and hear the witnesses and without ever being in a position to effectively evaluate the credibility of the witnesses. The court further ignored the testimony of the only expert witness to testify who rendered an opinion that Mr. Moyer had created a tripping hazard in his place of employment. Subsequently, an application for rehearing, which is set forth in Appendix D, was denied on March 31, 1969.

REASON FOR ALLOWING THE WRIT

The sole question presented is whether or not the Louisiana Supreme Court, by arbitrarily supplanting its judgment of the facts for that of the jury and of the Appellate Court of Louisiana, violated the constitutional guaranteed rights of petitioner, as provided by the Seventh and Fourteenth Amendment of the Constitution of the United States. More particularly, does the second clause of the Seventh Amendment which prohibits courts of the United States from re-examining facts tried by a jury, prohibit the several states from re-examining the facts.

Article 7, Section 41 of the Louisiana Constitution, which is the authority for the right to a jury trial in the State of Louisiana, provides in part:

> "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases . . ."

Thereafter, by Act No. 15 of 1960, the Legislature of the State of Louisiana adopted the *Code of Civil Procedure* carrying out of the mandate of the people. Chapter 7, Articles 1731 through 1814, granted jury trial to all citizens of the state as to all claims for $1,000 or more, with few exceptions as provided in Article 1733. Article 1792 provides:

> "In his charge to the jury, the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as

> to exercise any influence on their decisions as to the facts."

Thus, the jury's sole purpose is to weigh the evidence and pass upon the credibility of witnesses. As further evidence of the jury's providence, Article 1812 provides that the Court shall direct the entry of the appropriate judgment upon the verdict of the jury. Thus, the trial court is bound by the jury's finding of fact, unless as provided by Article 1814, the jury was bribed or behaved improperly so that impartial justice has not been done. Obviously, the intent of the Louisiana Legislature in enacting Chapter 7, of the Code of Civil Procedure, was to conform with the common law concept of a jury trial as contemplated by the Seventh Amendment of the Constitution of the United States and to make the findings of fact by the jury conclusive, absent the misbehavior of the jury that results in a denial of impartial justice.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Fourteenth Amendment, Section 1, provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Therefore, the question becomes whether or not the Louisiana Legislature, by granting to its citizens a fundamental right to a trial by jury in civil matters, has been subverted by the Louisiana Judiciary in violation of the Seventh Amendment and the due process clause of the Fourteenth Amendment.

At the outset, it is conceded that historically, the Seventh Amendment has been interpreted by this Honorable Court to apply to actions brought in the federal court only. In *Parsons v. Bedford,* 28 US 433, (1830), Mr. Justice Story, speaking for the court, said that the prohibition of the Seventh Amendment was applicable only to actions brought in the federal courts. Subsequent interpretations of the Seventh Amendment have further held that jury trials in state courts may be modified or even abolished. *New York Central Railroad Company v. White,* 37 S.Ct. 247; *Wagner Electric Manufacturing Company v. Lyndon,* 43 S.Ct. 589.

It is respectfully submitted that a close reading of

the Seventh Amendment does not restrict its constitutional guarantees to the federal system.

The amendment simply states that the right of trial by jury shall be preserved. When the Louisiana Legislature granted a trial by jury, it granted to its citizens a fundamental right embodied within the Seventh Amendment. Trial by jury forms the very heart of the judicial process. *U.S. ex rel, Toth v. Quarles,* 76 S.Ct. 1, *Simler v. Conner,* 83 S.Ct. 609. How can the appellate courts of Louisiana emasculate this fundamental right by re-examining facts tried by jury when federal courts sitting in Louisiana are not permitted to do so?

Consider the inconsistency that arises when two Louisiana citizens sustain identical compensable injuries. Assume that one can establish diversity of citizenship and brings an action in federal court while the other brings his action in state court. The citizen who filed in federal court can enjoy the full benefit of a trial by jury pursuant to the Seventh Amendment. The other, even though he obtains a favorable verdict, is subject to have the jury's findings arbitrarily set aside by an appellate court.

Clearly, in criminal matters, particularly the Sixth Amendment to the Constitution, this Court has held that a trial by jury is fundamental to the American scheme of justice and has declared that the Sixth Amendment when interpreted through the due process clause of the Fourteenth Amendment is enforceable against the states. *Duncan v. State of Louisiana,* 88 S.Ct. 1444; *Mapp v. Ohio,* 81 S.Ct. 1684.

Such an extension of the Seventh Amendment to the states is not without precedent. In *Chicago B & Q R. Co. v. City of Chicago,* 17 S.Ct. 581, (1897), the court held that the last clause of the Seventh Amendment is not restricted to its application to suits at common law tried before juries in the courts of the United States but applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by writ of error from the highest court of the state.

CONCLUSION

It is respectfully submitted that Petitioner was vested with a property right in the way of $45,000 by a jury, which property right was affirmed by the Court of Appeal, State of Louisiana; that the Louisiana Supreme Court arbitrarily and without benefit of viewing the witnesses deprived petitioner of her property right; and that such denial was in violation of Petitioner's rights pursuant to the Seventh and Fourteenth Amendment of the United States Constitution.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue in due course as provided for by law and rules of this court.

Respectfully submitted,

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Attorneys for petitioner

CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS

I, FLOYD J. REED, counsel for petitioner and a member of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for a writ of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid, as follows, to-wit:

Mr. James H. Drury
Attorney at Law
641 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Mr. C. Gordon Johnson, Jr.
Attorney at Law
925 Hibernia Building
New Orleans, Louisiana 70112

New Orleans, Louisiana, this ___ day of July, 1969.

FLOYD J. REED

SWORN TO AND SUBSCRIBED before me on this 28th day of June, 1969, at New Orleans, Louisiana.

NOTARY PUBLIC

APPENDIX A

CIVIL DISTRICT COURT FOR PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 437-210 DIVISION "F" DOCKET NO. 4

HENRY J. ESCHMANN and LOUISE M. BURDINE, WIFE OF HENRY ESCHMANN

vs.

R. KIRK MOYER, R. KIRK MOYER AGENCY, INC., GENERAL FIRE & CASUALTY COMPANY, LOUISIANA UNDERWRITERS OF AMERICAN INDEMNITY OF GALVESTON, TEXAS: MRS. ELMA C. SCHEFFLER, ADMINISTRATRIX OF THE ESTATE OF MRS. PETER A. CHOPIN AND ABC INSURANCE COMPANY

VERDICT OF JURY

This cause came on this day for further trial by jury.

PRESENT:

WILLIAM L. VON HOENE & R. BECKER, III, Attorneys for plaintiff

P. A. WITTMAN, Attorney for Mrs. Elma C. Scheffler, Administratrix of the Estate of Mrs. Peter A. Chopin

R. CURRY and JAMES DRURY, Attorneys for R. Kirk Moyer, R. Kirk Moyer Agency, Inc., and American Indemnity Company

DAVID L. STONE, Attorney for Elma C. Scheffler, Adele C. Uddo, Elizabeth C. Samuel, Mary C. Hayden, Frances C. Long

and Pacific Insurance Company of New York

And the following jury:

Jack Newman	James Wm. Mahaffey
Gerard Watler	Salvadore J. Guercia
Alfred Bayhi, Jr.	S. F. Counts
Charles F. Dalferes, Sr.	A. S. Junker
Glendon Johnson	Weldon A. Geldmacher
James J. Ferraro	A. W. Diermann, Jr.

When, after hearing the pleadings, evidence and argument of counsel, the case having been submitted to the jury and the charge of the Court having been delivered to them, the said jury retired to deliberate. Thereafter, the jury returned into Court and through their Foreman tendered the following verdict:

> "We, the Jury, find a verdict in favor of the plaintiff, Louise M. Burdine, wife of Henry Eschmann (as surviving spouse) and against the defendants R. Kirk Moyer and American Indemnity Company in the full sum of $45,000.00 jointly and in solido, and against the plaintiff, Louise M. Burdine, wife of Henry Eschmann (as surviving spouse) dismissing her suit as to defendants, Adele C. Uddo, Mary C. Hayden, Frances C. Long and Elma C. Scheffler.
>
> /s/ WELDON A. GELDMACHER
> FOREMAN"

and by request of counsel for the defendant the Court ordered the jury polled and the said jury having been polled were found to stand as follows:

FOR THE VERDICT:

Jack Newman
Girard Watler
Alfred Bayhi, Jr.
Glendon Johnson
James J. Ferraro
James Wm. Mahaffey
Salvadore J. Guercia
Stanley F. Counts
A. W. Diermann, Jr.

AGAINST THE VERDICT:

Weldon A. Geldmacher
Ashton S. Junker
Charles F. Dalferes, Sr.

Thereupon counsel for the plaintiff moved the Court to make the verdict of the jury the Judgment of the Court and the Court ordered said verdict to be recorded and Judgment to be entered in accordance therewith.

New Orleans, Louisiana
April 11, 1967

APPENDIX B

Henry J. ESCHMANN and Louise M. BURDINE, wife of Henry Eschmann

v.

R. Kirk MOYER, R. Kirk Moyer Agency, Inc., General Fire and Casualty Company, Louisiana Underwriters of American Indemnity of Galveston, Texas, Mrs.

Elma C. Scheffler, Administratrix of the Estate of Mrs. Peter A. Chopin and ABC Insurance Company.
No. 2875.
Court of Appeal of Louisiana.
Fourth Circuit.
March 4, 1968.
Rehearing Denied April 8, 1968.
Writ Granted June 4, 1968.

* * * *

Before CHASEZ, HALL and JANVIER, JJ.

HALL, Judge.

This is a suit for damages filed by Henry J. Eschmann and his wife, Mrs. Louise M. Burdine Eschmann, to recover damages occasioned by Mrs. Eschmann's fall down a flight of stairs. Mr. Eschmann died during the pendency of these proceedings and Mrs. Eschmann was substituted as sole party plaintiff.

At the time of the accident which occurred on October 19, 1964 Mrs. Eschmann was employed as a dictaphone-typist by the R. Kirk Moyer Agency, Inc. which leased office space on the second floor of the Chopin Florist Building at the corner of St. Charles and Washington Avenues in the City of New Orleans.

Her original suit was against R. Kirk Moyer, individually, and his insurer; R. Kirk Moyer Agency, Inc.. and its insurer; and Mrs. Elma C. Scheffler,

Administratrix of the Chopin Estate, alleged owner of the building.

Plaintiff's suit as to R. Kirk Moyer Agency, Inc. and its insurer was dismissed on exceptions.

The heirs of Mr. and Mrs. Chopin, viz. Elma C. Scheffler, Adele C. Uddo, Mary C. Hayden and Frances C. Long and their insurer, Pacific Insurance Company of New York, were substituted as defendants in the place of the Administratrix of the Chopin Estate.

An intervention was filed by General Fire & Casualty Company to recover workmen's compensation benefits paid by it to Mrs. Eschmann. The parties stipulated that General Fire & Casualty Company should be reimbursed up to the sum of $16,166.48 out of any recovery received by plaintiff.

The matter was tried by a jury which returned a 9 to 3 verdict in favor of plaintiff against R. Kirk Moyer and American Indemnity Company in solido in the full sum of $45,000.00 and dismissed the suit as to the other defendants, to wit: Adele C. Uddo, Mary C. Hayden, Frances C. Long and Elma C. Sheffler.

Judgment was rendered in accordance with the jury's verdict and in addition thereto judgment was rendered in favor of the Intervenor, General Fire & Casualty Company and against plaintiff in the sum of $16,166.48 representing compensation benefits paid to plaintiff.

The defendants R. Kirk Moyer and American Indemnity Company appealed. Plaintiff did not appeal

from any of the judgments rendered against her, nor did she answer defendants' appeal.

The sole question presented for our determination is the liability *vel non* of R. Kirk Moyer. Quantum is not at issue.

At the time of the accident the entire second floor of the Chopin Florist Building was under lease to R. Kirk Moyer Agency, Inc. from the Chopin heirs. R. Kirk Moyer was president and general manager of the agency.

Access to the offices of the agency was gained by means of a carpeted stairway which led to the second floor from the Washington Avenue entrance of the building. This stairway ended at a small landing or vestibule measuring approximately 4' x 4'. The entrance door to the main office of the agency opened onto this vestibule directly opposite the head of the stairs. The door to another office of the agency which led to the lunch room opened onto the vestibule to the left of the stairs as one ascended. A strip of carpeting ran from the head of the stairs to the main office door. This strip did not cover the entire vestibule so that there was approximately a foot of bare floor between the side of the strip and the door leading to the lunch room.

Plaintiff testified as follows: that at approximately noon on October 14, 1964 she left her desk in the main office of the agency to join several other employees in the lunch room. In order to get to the lunch room it was necessary for her to go out of her office through

the main office door opposite the head of the stairs, cross the small vestibule, and go through the door to her right which led to the lunch room. She had reached this other door and had her hand on it and was about to open it when she remembered leaving a confidential letter dictated by Mr. Moyer in her typewriter. She did not open the door but turned counter-clockwise to go back to her office to take the letter out of her typewriter. When she turned her left foot slipped or rolled over the top step of the stairs and she tumbled head first down the stairs. She was wearing flat heeled shoes at the time.

There were no eye-witnesses to the accident.

Plaintiff contends that her fall was due to the poor condition of the carpet strip. Defendants contend that there is no evidence in the record that there was any defect in the carpet strip. They further contend that there is no showing of negligence on the part of Mr. Moyer; that the accident was occasioned solely through plaintiff's own fault, inattention, haste, and negligence and alternatively that plaintiff was guilty of contributory negligence.

It is uncontradicted that the carpet strip in the vestibule as well as the carpet on the stairs was at least eleven or twelve years old, and the record contains ample testimony from the office employees that the carpet strip in the vestibule was worn down to the nap; that its edges were frayed; and that a small lump or ridge caused by the padding underneath ran across the strip about the center of the vestibule. Earl Gray, the agency's porter, testified that it was part of

his job to cut the fringes off the strip and to keep it tacked along the edges. There was testimony that this tacking had to be done every week or so. Mr. James E. Owens, an expert in the field of carpeting testified that from the photographs filed in evidence it appeared that the carpet's condition represented a "tripping hazard." He testified that a metal trim should have been applied along the edge of the carpet so that it would not turn up.

The record shows that Mr. Moyer was fully aware of the condition of the carpet. He testified that he had instructed the porter to trim the frayed edges as needed and admitted that the carpet often needed retacking which Gray did also.

There is a strong inference in the record that plaintiff's fall *might* have been caused by a "dizzy spell." She had a history of having had many serious ailments prior to the accident including at least one stroke which left her completely deaf in one ear. In 1962 she had had some difficulty in maintaining her equilibrium. She was hospitalized in the Spring of 1964 for numerous complaints. An electroencephalogram taken at that time stated in part "* * * Background normal, spiked discharges very suggestive of thalamic epilepsy, high correlation with headache and dizziness." Her treating physician, Dr. John A. Colcough, a neuro-surgeon, testified however that plaintiff had never in her life had a fainting spell or a convulsion.

Dr. Howard Karr testified for defendants as an expert neuro-surgeon. He had not treated plaintiff, but testified that it appeared from her medical records

prior to the accident that she had arteriosclerosis and that stumbling episodes in patients with this condition were not uncommon and, in fact, it was one of the usual things from which such patients should be protected.

As against the speculation that plaintiff's fall may have been caused by a dizzy spell we have plaintiff's positive testimony as to what caused her to fall. We also have the fact that she had been working at the agency eight hours a day, five days a week for many months prior to the accident and there is no testimony that any of her co-workers ever saw her fall or have a dizzy spell.

[1, 2] The record contains ample vidence to support the jury's finding, implicit in its verdict, that plaintiff's fall was due to the defective condition of the carpet in the vestibule and that Mr. Moyer was thoroughly cognizant of its condition and was personally negligent in not correcting it. We find no manifest error in such finding.

Defendants' plea of contributory negligence and assumption of risk was rejected by the jury. The record reveals that plaintiff was thoroughly familiar with the condition of the carpet in the vestibule and usually took another route to the lunch room in order to avoid it. However in this case plaintiff after having safely traversed the vestibule and being about to open the door leading to the lunch room had her attention momentarily diverted by the sudden remembrance of the confidential letter which had to be removed from

her typewriter and concealed from the view of other employees.

[3-5] In 65A C.J.S. Negligence § 120 (2), p. 63 et seq., the rule is stated as follows:

> "Momentary forgetfulness of, or inattention to, a known danger may, and usually does, amount to negligence, but forgetfulness of, or inattention to, such danger will not always constitute negligence. When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion.
>
> "Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. * * *

> "In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence."

[6] We are of the opinion that an ordinarily prudent person under the same circumstances as plaintiff would have forgotten the condition of the carpet and that her momentary forgetfulness was excusable and "was consistent with the exercise of ordinary care." We find no manifest error in the jury's rejection of the plea of contributory negligence. A case strikingly similar on the facts to the case at bar is McMurray v. Aetna Casualty & Surety Company, La.App., 141 So.2d 898.

For the foregoing reasons the judgment appealed from is affirmed; costs of this appeal to be borne by defendants-appellants.

Affirmed.

APPENDIX C

SUPREME COURT OF LOUISIANA

No. 49,244

HENRY J. ESCHMANN AND LOUISE M. BURDINE, WIFE OF HENRY ESCHMANN,

vs.

R. KIRK MOYER, ET AL

IN RE: R. Kirk Moyer and American Indemnity Company Applying for Certiorari, or Writ of Review, to the Court of Appeal, Fourth Circuit, Parish of Orleans, State of Louisiana.

HAMLIN, Justice:

In the exercise of our supervisory jurisdiction we directed certiorari to the Court of Appeal, Fourth Circuit, for review of its judgment which affirmed the judgment of the trial court. After considering the verdict of the jury, the law, and the evidence, the trial court rendered judgment: (a) in favor of plaintiff, Louise M. Burdine, Wife of Henry Eschmann (as surviving spouse),[1] (hereinafter referred to as either Louise M. Burdine or Mrs. Eschmann), and against the defendants, R. Kirk Moyer and American Indemnity

---

[1]Henry J. Eschmann died on October 19, 1966, during the pendency of this suit. Louise M. Burdine, Wife of Henry J. Eschmann, as surviving spouse, was substituted as party plaintiff and permitted to assert the claim on behalf of the community in these proceedings.

Company, in the sum of $45,000.00, together with interest and costs, jointly and in solido; (b) in favor of defendants, Adele C. Uddo, Mary C. Hayden, Frances C. Long, and Elma C. Scheffler, and against Louise M. Burdine, dismissing her suit as to these defendants at her costs; and (c) in favor of intervenor, General Fire and Casualty Company, and against Louise M. Burdine, in the sum of $16,166.48.[2] Art. VII, Sec. 11, La. Const. of 1921; 252 La. 267, 210 So.2d 508; 208 So.2d 405.

The Court of Appeal stated that the sole question presented for its determination was the liability vel non of R. Kirk Moyer, quantum not being at issue. Our consideration, however, will be directed primarily to the alleged personal negligence of defendant R. Kirk Moyer and the finding of the jury, the trial court, and the Court of Appeal, that such existed at the time of the accident. Because we shall hereinafter find that R. Kirk Moyer was not personally negligent, and such finding will necessitate the reversing of a jury verdict, we shall quote and narrate a great amount of the testimony of record.

Suit was instituted by Henry J. Eschmann and Louise M. Burdine, Wife of Henry Eschmann, on June 22, 1965, for damages allegedly resulting from injuries suffered by Mrs. Eschmann from a fall down a flight of stairs on October 19, 1964, at her place of employment as a dictaphone-typist on the premises 1552 Washington Avenue, New Orleans, Louisiana, leased by R. Kirk Moyer Agency, Inc. from the Heirs of Mr. and Mrs. Peter A. Chopin. Named as defendants were R.

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[2]This part of the judgment will be hereinafter discussed.

Kirk Moyer; R. Kirk Moyer Agency, Inc.; General Fire & Casualty Company; Louisiana Underwriters of American Indemnity of Galveston, Texas; Mrs. Elma C. Scheffler, Administratrix of the Estate of Mrs. Peter A. Chopin; and ABC Insurance Company.

On October 19, 1965, the trial court maintained an exception of no cause of action filed September 20, 1965, by General Fire and Casualty Company and R. Kirk Moyer Agency, Inc. The exception was based on the fact that as an employee of R. Kirk Moyer Agency, Inc., Mrs. Eschmann had not elected to be excluded from coverage under the Louisiana Workmen's Compensation Act and since the occurrence of the accident had been receiving workmen's compensation and medical benefits from her employer's workmen's compensation insurer, General Fire and Casualty Company.[3]

The Heirs of Mr. and Mrs. Peter A. Chopin, Adele C. Uddo, Mary C. Hayden, Frances C. Long, and Elma C. Scheffler, and their insurer, Pacific Insurance Company of New York, were substituted as defendants in place of the Administratrix of the Chopin Esfate.

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[3]LSA-R. S. 23:1032 provides: "The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations." See, Meche v. Farmers Drier & Storage Company, 193 So. 2d 807, writ refused, 250 La. 369, 195 So. 2d 644, wherein the Court stated: "An employer or principal subject to liability for workmen's compensation benefits cannot be held liable in tort to an injured employee or his survivors, since under LSA-R. S. 23:1032 the compensation remedy is then exclusive. * * * "

On November 18, 1965, General Fire and Casualty Company filed an intervention wherein it alleged it had been paying Louise M. Burdine workmen's compensation and medical expenses and prayed that it be paid by preference out of any judgment rendered in the matter. On April 12, 1967, James H. Drury, attorney for R. Kirk Moyer, R. Kirk Moyer Agency, Inc., and American Indemnity Company; William L. Von Hoene attorney for Henry J. Eschmann and Louise M. Burdine; David L. Stone, attorney for Elma C. Scheffler, Adele C. Uddo, Elizabeth C. Samuel, Mary C. Hayden, Frances C. Long, and Pacific Insurance Company of New York; and C. Gordon Johnson, Jr. of the firm of Porteous & Johnson, attorneys for General Fire and Casualty Company, entered into a stipulation whereby it was agreed that in the event of judgment in favor of plaintiff and against defendants, or any of them, intervenor was entitled to be paid by preference out of said judgment the amount of $16,166.48. The judgment of the trial court, supra, awarded intervenor the amount stipulated.

On March 3, 1967, Louise M. Burdine filed a supplemental and amended petition wherein she named R. Kirk Moyer, American Indemnity Company, Adele C. Uddo, Elizabeth C. Samuel, Mary C. Hayden, Frances C. Long, Elma C. Scheffler, and the Pacific Insurance Company of New York as defendants. She alleged in part:

> "Said stairway was used for the purpose of entering and leaving the upper or second floor offices of the premises and, as well as not having adequate lighting, the area at the head

of the stairs was not properly maintained. Petitioner avers that the defendants, R. Kirk Moyer, Adele C. Uddo, Elizabeth C. Samuel, Mary C. Hayden, Frances C. Long and Elma May C. Scheffler, owed her a duty of furnishing a safe means of ingress and egress to the leased premises and knew or should have known of the unsafe and deteriorated conditions of said stairway and particularly the area at the head of the stairs. Further, Defendants failed to remedy the condition within a reasonable period of time.

"Petitioner, Louise M. Eschmann, avers that the proximate cause of the said accident and subsequent injuries was the negligent failure of Defendants, Adele C. Uddo, Elizabeth C. Samuel, Mary C. Hayden, Frances C. Long and Elma May C. Scheffler, to maintain the premises in a safe condition and/or the negligent failure of R. Kirk Moyer and R. Kirk Moyer Agency, Inc. to provide her with a safe place to work.

"Defendant, R. Kirk Moyer, was aware of the unsafe condition existing at the head of the stairs of the premises located at 1552 Washington Avenue and personally failed to take any action as President of R. Kirk Moyer Agency, Inc. to correct the condition which has existed for over a period of several months. Furthermore, because Defendant, R. Kirk Moyer, used said stairway daily, he knew or should

have known of the dangerous condition of the stairway from his own observations."

In answer to Louise M. Burdine's supplemental petition, R. Kirk Moyer and his insurer denied negligence on Moyer's part; alternatively, they averred the contributory negligence of Louise M. Burdine.

The case was tried before a jury which returned a nine to three verdict in favor of Louise M. Burdine and against R. Kirk Moyer and American Indemnity in the sum of $45,000.00, jointly and in solido. Its verdict was also in favor of the Chopin Heirs and against Louise M. Burdine. The trial court rendered the judgment supra, in accordance with the jury's verdict.

R. Kirk Moyer and American Indemnity Company appealed. Louise M. Burdine neither appealed nor answered the appeal. As stated supra, the Court of Appeal affirmed the judgment of the trial court, finding, "The record contains ample evidence to support the jury's finding, implicit in its verdict, that plaintiff's fall was due to the defective condition of the carpet in the vestibule and that Mr. Moyer was thoroughly cognizant of its condition *and was personally negligent* in not correcting it. We find no manifest error in such finding." (Emphasis ours.)

R. Kirk Moyer and his insurer, American Indemnity Company, were granted this certiorari; they assign the following errors to the judgment of the Court of Appeal:

"1. The Court of Appeal erred in holding that the plaintiff-appellee, Mrs. Eschmann, had not assumed the risk of injury and was not guilty of contributory negligence.

"2. The Court of Appeal erred in holding that the doctrine of momentary forgetfulness applied in this case.

"3. The Court of Appeal erred in finding that R. Kirk Moyer, being thoroughly cognizant of the alleged defective condition of the carpet in question and being the President of R. Kirk Moyer Agency, Inc., the corporation occupying the premises where said carpet was situated, as lessee, was personally negligent in not correcting said condition."

Relators urge that the judgment of the Court of Appeal should be reversed, and that R. Kirk Moyer and American Indemnity Company should be absolved from any liability to Louise M. Burdine and intervenor, General Fire and Casualty Company.

Counsel for Louise M. Burdine contend that the jury reached a proper verdict; that the verdict was well founded in fact; and, that the judgment in her favor should be affirmed.

Counsel for intervenor orally stated in this Court that it was his contention that the judgment of the Court of Appeal should be affirmed.

We have examined the exhibits filed in evidence and find that the Court of Appeal correctly described the physical entrance to R. Kirk Moyer Agency, Inc. as follows:

> "Access to the offices of the agency was gained by means of a carpeted stairway which led to the second floor from the Washington Avenue entrance of the building. This stairway ended at a small landing or vestibule measuring approximately 4' x 4'. The entrance door to the main office of the agency opened onto this vestibule directly opposite the head of the stairs. The door to another office of the agency which led to the lunch room opened onto the vestibule to the left of the stairs as one ascended. A strip of carpeting ran from the head of the stairs to the main office door. This strip did not cover the entire vestibule so that there was approximately a foot of bare floor between the side of the strip and the door leading to the lunch room."

Because of our determination, we do not find it necessary to discuss the alleged assumption of the risk by Mrs. Eschmann and her alleged contributory negligence and momentary forgetfulness.

We have read the lengthy testimony of record, over three hundred and fifty pages, and we find that Mrs. Eschmann worked for R. Kirk Moyer Agency, Inc. from January 1962 until August, 1962, at which time she became ill. She returned to work in November, 1962, and continued to work until the time of the accident.

At the time of trial, she testified that she was fifty-one years of age and weighed approximately one hundred and ninety-five pounds; she said she weighed more at the time of the accident. Her version of the accident is as follows:

> "A. Well, I was typing this letter, and it was one of the personal, confidential ones, and always when I went to lunch I would cut my typewriter off, and if it was an ordinary letter I'd leave it in the typewriter until I came back. If it was something confidential, I would take it out of the typewriter and turn it upside down so that nobody passing could glance over and read it. So, this day I was typing one of these letters, and the girls — we went in two groups to lunch. Sue didn't go on that group, she sat at the front. Now, I don't know if she was there when I left or not, but her place was in the front, unless she was in the back at the files; and the girls had come on this lunchtime, and I got up and I cut my typewriter off and I started behind the last one out; and they had gone in and closed that door, the glass door, and we were told to keep the doors closed on account of the air conditioning getting out into the hall. So, I closed the wooden door and had just — you can't run because it's only about two or three steps from one door to the other one, and I had reached over and taken my couple of steps, and I had my hand on the claims door when I remembered that letter was still in my typewriter, so I turned around to come back and open that door; and I had

one hand trying to get to the door, I hadn't got to that door yet, and one foot caught in the rug and I saw I was falling. I grapped [grabbed] for the railing and I didn't make it. The other foot kept going on over, and I went down behind it, and I remember screaming or trying to scream. I don't know if anybody heard me, but then that's all I know.

"Q. And you tumbled head first down the landing?

"A. Yes sir."

Mrs. Eschmann further testified:

"At the landing, no sir, I wasn't looking down. I would say I was more apt to be looking at the door knob to open the door, to go into the glass — the office with the glass door. * * * Well, then my foot caught on the frayed edges, and — or the bump, and then my other foot slipped over the edge with the rug. The rug went, and I went with it."

When asked whether she knew the rug was loose, Mrs. Eschmann stated that all of the rugs were loose; that the stairway rug was loose all the way down. Her testimony with respect to having voiced a complaint is as follows:

"Q. Did you complain to this man, Mr. Kirk Moyer?

"A. I told him about the hole.

"Q. What hole?

"A. The hole where I broke the heel of my shoe, but I don't know if I told him about this landing or not.

* * *

"Q. But you didn't tell him anything being wrong with this carpet, either, about being loose?

"A. I don't think I told him that. I think I told Mrs. Schekeler. I told somebody."

At the time of trial, R. Kirk Moyer Agency, Inc. was no longer in business. Mr. Moyer testified that the corporation, originally known as Sinclair, Inc., was formed in 1938; that in about August, 1939, after purchasing the agency from his father-in-law, he became president and changed its name. Mr. Moyer's wife owned 98% of the shares of stock, Mr. Moyer owned one share, and P. B. Erato, Jr. owned the remaining share. Mr. Moyer further testified that he had charge of the agency, but that he delegated some authority and held directors and shareholders meetings. At the time of the accident, the approximately fifteen persons employed entered the front door and went up the stairs to the landing where Mrs. Eschmann fell. Mr. Moyer testified that all the nap had worn off the carpet, but that there was nothing basically wrong wth it. When asked about the responsibility for the carpet, he stated:

> "Well, of course, the carpet didn't belong to us, I don't suppose — I think had it deteriorated we would have requested our landlords to replace it, but it had not deteriorated and therefore we just maintained it. I had my porters with specific instructions to always

make sure that it was tight. If I would come in the morning, and maybe after weeks suddenly find that maybe the third step from the bottom had a tack loose, probably three or four or five [or] six others that were still holding, and one loose, I would call it to his attention, so it was generally kept tight."

When questioned about Mrs. Eschmann's action just prior to the accident, Mr. Moyer testified:

"Q. Did you have occasion to observe her as she went through this door, about the noon hour?
"A. I certainly did, yes.
"Q. What did you see, Mr. Moyer?
"A. Well, she was — she was almost running, she was going so fast.
"Q. Running where?
"A. From her desk. The girls in the kitchen had apparently announced that they would go to lunch or something of the sort, and then they had gone ahead of her and she was going, obviously she was going out to the kitchenette for lunch.
"Q. All right, sir, continue; what did you next see or hear?
"A. Well, after she, as I say, she was going very rapidly, almost running."

When questioned about his actions immediately after the accident and his observation of the rug at the top of the stair-landing, Mr. Moyer testified:

"Q. After she fell, Mr. Moyer, did you have occasion to go back and check the top of the landing?

"A. Yes, after she was in the ambulance on the way to the hospital I did go back and check, and may I demonstrate what I did? I was so concerned about this, I couldn't imagine what had happened, so I went out with my heel like this (standing and demonstrating), and I was trying to find something loose, and there wasn't anything loose on it, right after the accident.

"Q. But you did find a lump in the rug, didn't you, Mr. Moyer?

"A. No — well, yes and no. There was padding under the rug, and there was perhaps a little — there was a little congregation, you might say, of the padding at one little spot there, yes. However, we were trying to figure out what on earth happened, and we just couldn't perceive that anybody could have fallen over such a little thing.

* * *

"A. There was a little — perhaps a little hump, very small, where the material, you know, the — what do you call it — the padding under the rug had perhaps caused just a very slight little rise there, yes.

"Q. But it was bad enough that you thought to tell Earl Gray to correct it?

"A. Yes, I suppose I did.

"Q. And the thought ran through your mind at that time that someone could have tripped over this lump?

"A. No, the thought in my mind, I still didn't see how anybody could have — it was general maintenance as far as I was concerned, any instructions to him, but I don't see how anyone could have tripped over that."

Earl Gray, porter, testified that he did not witness the accident. He went to work on the afternoon of the accident and looked at the carpet on the stairs and on the landing. He was asked: "What did you see? In other words, what I'm trying to find out, to use a common expression, did you find anything wrong with the carpet?" He responded, "I didn't find anything wrong, no."

There were no witnesses to the accident. Immediately thereafter, a number of Mrs. Eschmann's fellow employees rushed to the scene; they observed the landing and stairs and later testified in these proceedings.

Mrs. Suzanne Kappesser testified that there was a small lump in the rug at the landing, between a quarter of an inch and a half-inch high.

Mrs. Inez Gibbons, who was not working for R. Kirk Moyer Agency, Inc. at the time of the accident but had previously worked for the agency, testified that the carpet was worn and on occasions was loose.

Peter J. O'Reilly, Jr. stated that the carpet was secured, and he "felt" that the carpet was in good repair and safe. He said there was a slight rise, but that

it had been there for years; that whenever a loose spot was noticed in the twenty-five or thirty feet of carpeting, the porter was requested to tack it.

Earl Gray, supra, testified that he did tack the carpet when such tacking was needed.

Kathryn M. Vreeland said the carpet was secure and tacked down, and that she had not observed any lumps.

Lillian J. West, when asked whether she examined or looked at the rug, said: "Yes, I did. Right after I stood there, I looked around and I put my foot around to see if I could feel anything protruding, but everything was — I didn't see anything that would make anybody trip or slip, or anything like that." She further stated that the rug was tacked.

Marilyn West did not recall seeing anything wrong with the carpet.

Olivette Micholet stated that she did not notice anything wrong with the carpet.

Dora Cardenia testified that the employees examined the carpet during the afternoon of the day of the accident. Her testimony is as follows:

"Q. On that day did you have occasion to look down at the carpet?
"A. Yes, after it happened I did.
"Q. And about how long after was it, after the accident was it that you looked down there?

"A. I couldn't tell exactly how long after, but that same afternoon we examined the carpet.
"Q. What did you find on examining it?
"A. That particular area was not torn, and it was — the edges were nailed down, it was no raw edges.
"Q. Excuse me, I didn't mean to cut you off. Did you find anything that indicated to you what might have been the cause of her fall?
"A. No sir, I didn't.
"Q. Did you see anything, to use a common expression, which might be termed wrong, or any defects?
"A. I didn't, no sir.
"Q. And you examined the carpet?
"A. Yes."

A reading of the testimony, particularly that above quoted and narrated, constrains us to conclude that the carpet on the landing of the vestibule where Mrs. Eschmann fell was not so defective as to constitute a trap or hazard. "Thus, a 'hazard' is a danger or risk lurking in a situation or place. This definition of 'hazard' is in common use, as one may speak of a sharp curve in a highway as a hazard; of steep steps as a hazard; and that life itself is a hazard." Service Welding & Mach. Co. v. Michigan Mutual Liability Co., 311 F.2d 612, 617. Admitting that the carpet contained a slight rise - it was so slight as not to be seen by some of the employees of R. Kirk Moyer Agency, Inc. - we do not find that it was of such a size as to make the rug dangerous. Although the rug was old, the nap being

worn, we do not find that its condition was such as to precipitate Mrs. Eschmann's fall.

Mrs. Eschmann contends that because of his alleged personal negligence supra, her immediate superior, R. Kirk Moyer, is personally liable to her in tort.

LSA-R.S. 23:13 provides that:

> "Every employer shall furnish employment which shall be reasonably safe for the employees therein. They shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such employment and the place of employment safe in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees. * * *" See, 56 C.J.S., Master and Servant, Sec. 214, p. 922; 35 Am. Jur., Master and Servant, Sec. 104, p. 532; Wiltz v. Esso Standard Oil Company, 126 So.2d 649; White v. Nutriline Milling Co., 133 La. 870, 63 So. 385; Carey v. Sellers, 41 La. Ann. 500, 6 So. 813. Cf. Fontenot v. Raftery, 14 So.2d 77.

The evidence of record affirms the fact that Mr. Moyer knew that the carpeting had to be secure; his porter was instructed by him to inspect the carpet and make sure that no dangerous looseness existed.

The evidence discloses that this was done. The photographs submitted in evidence reflect that the office space occupied by R. Kirk Moyer, Agency, Inc. was not located in a new modern office building; it was not spacious nor luxurious. Under such circumstances, we conclude that Mrs. Eschmann's place of employment was in accordance with the accepted and approved practice in such or similar places of employment. Because of our previous finding with respect to the condition of the rug in the vestibule, we do not find that Mr. Moyer was under a duty to warn Mrs. Eschmann to be careful when traversing the vestibule. We do not find that it was incumbent upon him to recommend to his corporation that it buy and replace old rugs that had lost their nap. We find no personal negligence on Mr. Moyer's part. He and his insurer are therefore not personally liable in tort to Mrs. Eschmann for the injuries suffered.

All parties admit that Mrs. Eschmann slipped and fell down the stairs, suffering severe head and bodily injuries. However, only Mrs. Eschmann testified that the cause of her fall was the physical condition of the vestibule rug. In substance, the testimony of the other witnesses with respect to the rug's condition contradicts that of Mrs. Eschmann. Therefore, we conclude that the weight of the testimony does not support Mrs. Eschmann's contentions.

For the reasons assigned, the judgment of the Court of Appeal, Fourth Circuit, is reversed and set aside, insofar as it affirmed the judgment of the trial court in favor of Louise M. Burdine Eschmann and against the defendants R. Kirk Moyer and American Indemnity

Company in the sum of $45,000.00, together with interest and costs, jointly and in solido, and plaintiff's suit as to them is dismissed at her costs.

It is further ordered that the judgment of the Court of Appeal affirming the judgment of the trial court in favor of intervenor, General Fire and Casualty Company, and against plaintiff, Louise M. Burdine Eschmann, in the sum of $16,144.48, is reversed and set aside at intervenor's costs.

* * * *

APPENDIX D

APPLICATION FOR REHEARING
UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE STATE OF LOUISIANA
New Orleans 70112

New Orleans, Monday, March 31, 1969

Court was duly opened, pursuant to adjournment. Present Their Honors: John B. Fournet, Chief Justice, Joe B. Hamiter, E. Howard McCaleb, Walter B. Hamlin, Joe W. Sanders, Frank W. Summers, and Mack E. Barham Associate Justices.

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REHEARINGS REFUSED

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49,244 Eschmann et al v. Moyer et al

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I, Harold A. Moise, Jr., Deputy Clerk of the Supreme Court of the State of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 25th day of June, A.D., 1969.

(Signed) HAROLD A. MOISE JR.
Deputy Clerk
Supreme Court of the
State of Louisiana

SEAL

APPENDIX E

LOUISIANA CONSTITUTION, ARTICLE 7, SECTION 11

CERTIORARI AND OTHER WRITS TO COURTS OF APPEAL; TIME; JUDGMENT OF COURT OF APPEAL

Section 11. It shall be competent for the Supreme Court to require by writ of certiorari, or otherwise, any case to be certified from the

Courts of Appeal to it for review, with the same power and authority in the case as if it had been carried directly by appeal to the said court; provided, that where the application is based solely upon the ground that the decision of the question of law involved is in conflict with the jurisprudence of the Supreme Court or another Court of Appeal upon a question not yet decided by the Supreme Court, and it is found that such is the fact, then the application shall be granted as a matter of right; provided, however, that the Supreme Court shall in no case exercise the power conferred by this Article unless the application shall have been made to the court or to one of the justices thereof within thirty days after a rehearing shall have been refused by the Court of Appeal; and provided further, that the judgment of the Court of Appeal shall not become executory until the expiration of thirty days; or, in cases in which application is made for the writ of review, or other writs, until the decision of the Supreme Court upon the application shall have become final.